No. 195

IN THE

United States Circuit Court of Appeals,

For the Ninth Circuit.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

NANNIE S. McWHIRTER.
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

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Filed this 4th day of February, 1895.

Clerk.

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Statement of the Case.

This action is prosecuted on a writ of error from the Circuit Court of the Ninth Circuit in and for the Northern District of California, and was brought by Nannie S. McWhirter, the plaintiff in the Court below, to recover the sum of fifteen thousand dollars ($15,000.00) and interest alleged to be due upon two certain policies of insurance issued by plaintiff in error upon the life of Louis B. McWhirter, her husband, and payable to her as the beneficiary therein

named, one of said policies being dated December, 19th A. D. 1891, and being for the sum of five thousand dollars ($5,000.00) and the other being dated March 15th, A. D. 1892, and being for the sum of ten thousand dollars ($10,000.00).

The complaint is in two counts and is substantially as follows:

It alleges that, the plaintiff in error is a Corporation, organized under the laws of the State of Connecticut for the purpose of conducting and carrying on the business of life insurance, and that at the times in the complaint named it was carrying on business in the State of California.

It alleges that, the plaintiff in the Court below and Louis B. McWhirter were, up to the 29th day of August, A. D. 1892, husband and wife.

It alleges that, on the 19th day of December, A. D. 1891, that the defendant for a valuable consideration issued its certain policy of insurance, and then proceeds to set forth some of the terms and conditions of said policy (see Tr. pp. 2–3–4), one of said conditions being that said Insurance Company should not be held liable thereon, if the death of the insured was caused by self destruction. (Tr. p. 4.)

Then said complaint further alleges:

"And the plaintiff further alleges, that each and all "of the several answers, warranties and agreements "*contained in the application for insurance which was and* "*is the basis of and a part of the said policy*, were and

"*are true* in the *letter* and the *spirit* thereof, and the "said warranties and agreements have been performed "and made good." (Tr. p. 5.) (Italics are ours).

That all of the premiums due under the said policy have been paid; and said complaint further alleges:

"That the said Louis B. McWhirter did not die "from any cause in the said policy named, but that "he did die on the 29th day of August, A. D. 1892, at "the city of Fresno, county of Fresno, and State of "California, *by being murdered and assassinated by "certain persons to the plaintiff unknown.*"

That no assignment of said policy had been made.

That due notice and satisfactory evidence of the death of said assured, Louis B. McWhirter, was delivered to and received by defendant, at its office in Hartford, Connecticut, prior to the first day of December, A. D. 1892.

That no part of said five thousand dollars ($5000.) had been paid, etc.

The second count is substantially the same in form as the first, except the date of the policy, and the amount of the same.

To said complaint the plaintiff in error filed a demurrer, which appears on pages 18–19–20–21 and 22 of the Transcript, which demurrer was by the Court overruled, and which ruling is assigned as one of the errors upon this writ, and to which we will call the Court's attention later on in this brief.

Said demurrer being overruled, the defendant then filed its answer, which answer appears on pages 24

to 71 of the Transcript, and *denies* that the warranties in the complaint set forth and contained in the applications for said insurance were true, or that the agreements or warranties had been kept and performed or made good; *denies* that said Mc Whirter did not die from any cause in said policy named as an excepted risk on the life of said Mc Whirter; *denies* that said Mc Whirter was murdered or assasinated by any one whomsoever, and alleges that said McWhirter died by self destruction, that is to say, that at the time and place in complaint mentioned said Louis B. Mc Whirter committed suicide, and that at said time said Mc Whirter was not insane, etc. (Tr. pp. 24–25.)

Said answer then sets forth in full, the provision of said policy in regard to suicide, and alleges affirmatively that said Louis B. Mc Whirter violated said provision by committing suicide, or that he died by his own hand, etc. (Tr. pp. 25–26–27.)

The third count in said answer alleges a breach of warranty on the part of said Louis B. Mc Whirter and Nannie S. Mc Whirter in this, that said Louis B. Mc Whirter had given a false and fraudulent answer to one of the questions contained in the application for insurance, and sets forth said application in full. (Tr. pp. 28 to 35.)

The particular question to which said Court is directed is as follows:

"No. 11. Is there *any fact* relating to your physical "condition, *personal* or family history, or habits which

"has not been stated in the answers to the foregoing "questions, *and with which the Company ought to be made "acquainted?* Answer, *No.*" (Italics are ours.)

The warranty, which was signed by both, the assured and the beneficiary, was as follows :

It is hereby declared and warranted that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this application and the several answers, warranties and agreements herein contained shall be the basis of, a part of the consideration for, and a part of the contract of insurance, and that no statement or declaration made to any agent, solicitor, canvasser, examiner, or any other person, and not contained in this application, shall be taken or considered as having been made to, or brought to the notice or knowledge of the Company, or as charging it with any liability by reason thereof; and that if there be, in any of the answers herein made, any fraud, untruth, evasion, or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the Company. It is agreed that the policy hereby applied for shall, if granted, be held to be issued and delivered at Hartford, in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said policy for its continuance as paid-up insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties

hereto under any law of any State relating to the lapse or forfeiture of policies of life insurance.

Dated at Fresno this 19th day of November, 1891.

Signature of the person or persons for whose benefit the insurance is to be effected. (Write the names in full.)

NANNIE S. McWHIRTER,
By LOUIS B. McWHIRTER.

Signature of the person whose life is proposed for insurance. (Write the name in full.)

Witness the signing hereof,

LOUIS BRANSFORD McWHIRTER.

J. B. HAYS.

The answer further alleges, that said Louis B. McWhirter fraudulently and intentionally omitted to communicate to said Company, in said application, facts which were material to said contract of insurance; which if the same had been communicated to said defendant, said defendant would not have issued said policy of insurance upon the life of McWhirter.

Said facts appear on page 36 of the Transcript, and are in substance, that at and prior to the time of making his application for insurance to said defendant, that said Louis B. McWhirter had had many difficulties with various persons who had threatened to kill him, said McWhirter, and that at the time of making said applications and accepting said policy of insurance said McWhirter was in fear of being killed by reason of said threats, and was in danger of being murdered, etc., and that it was by reason of such fears

and of such threats that he made said applications. (See Tr. pp. 36-37).

The next count in the answer alleges that said concealment of said facts was a fraud upon said Insurance Company which vitiated the policy. (See Tr. pp. 45-47).

The answer to the second count of said complaint is substantially the same as to the first, simply changing the same as to date and amount of policy. Hence in substance the answer raised the following issues:

1st. It denied the allegation of murder or assassination.

2nd. It denied the allegation that the assured had not died by his own hand.

3rd. It alleged a breach of warranty in the answer in the application; and

4th. It alleged fraudulent concealment of material facts in said application.

The facts out of which this controversy grew are as follows:

On the morning of the 28th of August, A. D., 1892, between the hours of one and two o'clock, Louis B. McWhirter, the assured, arose from his bed after he had ostensibly retired for the night, awakened his wife, and informed her that he thought he heard some one walking in his yard, asked her if she did not hear them. Upon being informed by her that she did not, and anything he might have heard was probably

their little dog; then informed her that some water melon he had eaten did not agree with him, or something to the same effect, put on his shoes and his trousers, and taking a revolver in his hand, started out by his front door into his front yard. As he went out the front door he rang the door bell, and called back to his wife that he had rung it by accident; he then went towards his back yard, towards his water closet. As he passed his bed-room window he had some conversation with his wife when, in answer to her question, he again repeated that he had rung the bell by an accident. In a short time after this conversation a number of pistol shots were fired in the back part of his yard. (The number we will treat of hereafter). His wife ran out and found him lying in the yard unconscious with a pistol shot through his lung and heart. He never thereafter became conscious and died within an hour.

Louis B. McWhirter had either been foully murdered or he had died by his own hand.

Subsequent investigation developed the following facts as shown by the evidence in this Transcript.

He was thirty-eight years old.

He had never been successful either in his profession or in his business.

Prior to his marriage he had been compelled to draw upon his father and his mother for money to meet his living expenses. (Tr. p. 114.)

He had been compelled to borrow money from his friends to get married upon. (Tr. p. 114.)

He married a young lady of wealth and gradually dissipated her fortune to such an extent that shortly prior to his death, after having either sold or mortgaged all the rest of her property, she was compelled to and did mortgage her homestead. (Tr. pp. 108–109–110–111.)

He was a man of no credit. (Tr. pp. 113–115).

He had been arrested upon a criminal charge. That of attempting to extort money. (Tr. pp. 228-229.)

He was greatly worried over being charged with the crime. (Tr. p. 230)

He had been notified by the bank that certain monies secured by mortgage were long overdue, and if not paid foreclosure proceedings would be commenced (Tr. p. 112).

He had been notified that his insurance premiums were at his bank for collection (Tr. p. 113.)

The foregoing were some of the facts showing the mental and financial condition of Louis B. McWhirter, the assured, at and prior to his death.

A further investigation of the facts show. That in the month of December, A. D. 1891, the assured, Louis B. McWhirter, commenced taking insurance upon his life, and between the 19th day of December, A. D. 1891, and the 1st day of June, A. D. 1892, a period of six months, he did obtain life insurance policies on his life from this plaintiff in error and other companies to the amount of sixty thousand dollars, to wit, forty-five thousand dollars in other companies and fifteen thousand in the company of plaintiff in error,

and *all* of *said insurance except the 1st policy in plaintiff's Company for $5000, was obtained between the the 1st of March and the 1st of June making $55,000 insurance obtained in three months.* (Tr. pp. 107–108.)

In the month of May, A. D. 1892, he endeavored to obtain from the witness Valentine, insurance to the amount of $20,000, going to said Valentine to make his own application, not being solicited therefor (Tr. p. 115).

He informed the witness Bates that he had insurance to the amount of $60,000 and was trying to get $40,000 more. (Tr. p. 232.)

Hence here was a man without money, without credit, without business, and without any income whatever and indebted and unable to pay; a man who had been in a measure at least supported by his parents prior to his marriage, and who had gradually but surely eaten up the patrimony of his wife since his marriage. Carrying $60,000 insurance, and endeavoring to put himself in a position of carrying $100,000. Part at least of the premiums were not paid at the time of his death (Tr. p. 113), and part at least, he endeavored to obtain on his own personal credit by giving his own promissory note therefor, refusing to have his wife the beneficiary, sign or endorse them, or either of them (Tr. p. 115–116), and being greatly displeased when such a matter was suggested.

He then commenced to talk to his friends of his life being in danger and of his having been threatened,

but while he communicated to his friends and acquaintences that he had been threatened he failed to state by whom he had been so threatened or from whom he was apprehensive of danger. And strange as it may seem, that although they allege in their complaint that he was murdered, *not a single witness was produced at the trial who ever heard any person* threaten him with bodily injury of any kind or character.

Louis B. McWhirter expected to die, and commenced making his preparations.

He first obtained his life insurance.

He second commenced to prepare his wife and his relations for the event.

He spoke to his wife about being killed (Tr. p. 150).

He spoke to his brother-in-law, Lee Blassingame, asking him if anything happened to him to take care of his boy. (Tr. p. 175.)

He spoke to J. H. Lane about being killed. Said he expected *to be killed.* (Tr. p. 150.)

To Thomas H. Bates. (Tr. p. 232).

To all of these he said in substance that he expected to be killed, but did not inform them by whom or how.

On the day before his death he called his wife to him and told her, how he wanted her to change their house, when he was gone.

He twice on that day told her how he desired their son to be raised and educated; how he wanted her to send for and have him come and live with her, *when he was gone.* He went into all the minute details.

Verily he set his house in order, preparing for his departure. (Tr. pp. 151–155.)

He spoke as he had never spoken before (Tr. p. 156).

His conversation was such that his wife *knew that something was going to happen to him that night* (Tr. pp. 156–157.)

And last, but not least of his preparations, was the letter to his wife, dated June 25, A. D. 1892 (Tr. pp. 122-123, 154-155), telling her what he wanted done after he was gone; telling her he knew its *words* would kill her, but she must bear up and live for the child's sake, etc.

All of this had he done prior to the morning of August 29th, A. D. 1892.

We have hereinbefore stated what he did after retiring for the night; how he got up; spoke of the noise; spoke of being indisposed; put on his shoes and trousers; took his revolver; went out his front door, rang the bell; spoke twice to his wife; went to the back part of his yard. Shots were fired, and his wife ran out and found him lying in the yard, unconscious, with a bullet hole into his heart. His outer shirt and under shirt *powder burned* (Tr. p. 117). No bruises upon his body; no discolorations or abrasions of his skin.

The premises in which McWhirter lived fronted upon one of the public streets of Fresno. Through the alley running parallel with the same street was an alley, the yard ran back to this alley, and along the back part of the yard, along the alley, was a board fence *four feet high*. In one corner of the back yard was his water closet, and in the other was his chicken house. There was a gate in the back fence about the

middle of the yard. By the side of where McWhirter lay in the yard, and close by his right hand, was picked up a revolver containing six chambers, which was admitted to be his. Three of the chambers had been discharged; the other three were found loaded with cartridges—41 calibre short. Some twelve or fifteen feet from where he lay was found another revolver containing six chambers three of which had been discharged, and the remaining three were found to contain cartridges—*41 calibre short.*

The bullet taken from the body of McWhirter *was a 41 calibre short.* An investigation of the water closet and the fence surrounding McWhirter's yard, showed that five shots had been fired, two through the water closet and three through the fence. *All of these bullets had gone from the inside of the yard outwards.*

Near where the second revolver was found, and against the fence were found two osage orange clubs about two feet long, with a piece of cotton clothes line tied around each in a loop, ostensibly to attach them to the wrist. The ropes were so poorly tied on that they dropped off immediately upon being picked up. The cotton clothes line had been freshly cut, and was identical with the clothes line in the back yard of McWhirter, which had also been freshly cut, and upon being compared fitted exactly as to length, size and the cuts. The osage orange clubs had been poorly sawed with a saw that had defective teeth. In the vacant lot adjacent to McWhirter's residence was some osage orange trees that had been dug up some

six months before. In McWhirter's chicken house it was found where some sawing had recently been done *and the saw dust was osage orange saw dust.* In the same chicken house was found McWhirter's saw *that had a defective tooth*; from the teeth of this saw was taken *fresh osage orange saw dust.*

When the saw was fitted upon the clubs where the same had been freshly sawed it was found that the indenture in the clubs and the defective tooth in the saw *fitted exactly.*

A piece of cloth with holes cut in it was found in the yard, formed in the shape of a mask, but it was so large that it would not stay upon any man's head and would almost go over the head of a horse.

From this fence, four feet high, near the water closet, two boards were found knocked off and *carefully set up against the fence upon the alley side.*

These boards had been knocked off from the inside with fifteen strokes on one board and sixteen upon the other with a hatchet or hammer having an octagon face. A hatchet was found in the wood house of McWhirter having such octagon face, and it fitted into a number of the indentures in the boards exactly.

There was some conflict in the evidence as to the *number* of shots fired, as to whether there were six or seven.

The first person who came to the scene was the witness, Thomas Rhodes, and he was at the alley fence almost as soon as the shooting ceased, and saw no one but the assured lying in the yard and his wife beside him. (Tr. pp. 125–126–127.)

These are briefly the main facts shown by the record connected with the death of Louis B. McWhirter, the assured.

The case was tried before a jury, who rendered a verdict for the plaintiff for the full amount of both policies together with interest.

Points and Authorities.

I.

The demurrer should have been sustained for the following reasons:

First.

The complaint alleges as follows:

"And the plaintiff further alleges that each and *all* "of the several answers, warranties and agreements "*contained in the application for insurance which was and* "*is the basis of and a part of said policy, etc.*" (Tr, p. 5.)

Although showing upon the face of the complaint that there was an application and that it was a part of the contract of insurance, the complaint failed to set forth said application or to plead its legal effect.

The defendant demurred to the complaint upon that ground. (Tr. pp. 18–20.)

The Court overruled said demurrer. This ruling we submit was error, for the plaintiff in the Court below was violating all rules of pleading by pleading only *a part* of his contract and leaving the remainder of it to surmise or conjecture.

This identical point was before the Supreme Court of the State of California in the case of *Gilmore* vs.

The Lycoming Fire Ins. Co., 55 Cal. 124, where the Court, by McKinstry, J., says: "The demurrer to the "complaint should have been sustained. Where a "party relies upon a contract in writing, and it affirm-"atively appears that all the terms of the contract are "not set forth in *heac verba*, nor stated in their legal "effect, but that a portion which may be material has "been omitted, the complaint is insufficient."

See also

Tischler *vs.* The Cal. Farmer's M. I. Co., 66 Cal. 179.

These cases, we think, are decisive of the point even if they were needed to assist out the general will of pleading that a pleader must plead an entire contract and not a part of one.

Second.

The complaint is insufficient, and defendant's demurrer should have been sustained thereto for the reason: that it fails to show upon its face that proof of death or evidence of death had been received by the defendant Company thirty days before the action was commenced. The complaint alleges that the Insurance Company agree to pay the said beneficiary Nannie S. McWhirter, etc., "*within thirty days after "due and satisfactory evidence of the death of said insured;*" but it failed to allege that said thirty days had expired before the action was commenced.

This was a necessary and essential obligation.

Cowan *vs.* The Phenix Ins. Co., 78 Cal., 188.
Doyle *vs.* The Phenix Ins. Co., 44 Cal., 267.

Abbott *vs.* Aslett, 1 Mees & W., 209.
Irving *vs.* Excelsior Ins Co., 1 Bosw., 514.
Campbell *vs* Charter Oak, 10 Allen, 218.
Williams *vs.* Knighten, 1 Oregon, 234.
May on Insurance, Sec. 589, page 1333, N. 6.

It will be readily seen from the above decisions that under the rule of pleading in this State that said complaint would not be sufficient, and the same rules are to be adopted and applied in the federal Courts within this jurisdiction.

Sec. 914 Revised Statutes, U. S.

For these reasons we think that the demurrer of of the plaintiff in error should have been sustained

II.

We submit that the ruling of the Hon. Circuit Court rejecting the testimony of E. F. Bernhard, was error. Plaintiff in error offered to prove by said witness that the insured had stated to him, some two years before his death, that he Louis B. McWhirter, had stated to the witness that if he, McWhirter, ever did any thing that would bring disgrace upon him or his family, he would kill himself. (Tr. pp. 235–236).

It had been shown that he had been arrested upon a criminal charge but a short time prior to his death. (Tr. pp. 226–227–228–229–230.)

It was shown that he felt the disgrace very keenly; that he had lost flesh over it; that it was worrying himself and his wife almost to death. (Tr. p. 230.)

It was shown that his trial on said charge had been set for September 22. (Tr. p. 130.)

In fact it was shown that just such a state of facts *had occured* which he had declared if did occur he would kill himself, and we submit that his prior declarations should have been permitted to go to the jury as a circumstance in connection with the other circumstances in the case, for the purpose of showing whether or not he did die by his own hand.

Then again, we submit, that the testimony was admissible for the purpose of showing the state of mind of said McWhirter; that he ever spoke of committing suicide under any circumstances was an inquiry pertinent to the issue. Louis B. McWhirter was on trial, as it were, for committing a crime, to wit, suicide. Let us reverse the matter and suppose that he had been on trial for killing some other person. Can it be said that his threat or declaration that under certain circumstances he would kill that person, and it was shown that the identical circumstance under which he said he would kill him had occurred; that said threat or declaration would not be admissible. We think not. Suppose he had said in 1889, that if John Smith slandered him he would kill Smith, and it was shown that in 1892, Smith had slanderded him and Smith was afterwards found dead, shot by some unknown person in the night time, in his own yard, and McWhirter was on trial for the homicide, would not the prior declarations of McWhirter be admissible? We think there would be no question about it. It must be remembered that all of the evidence in re-

lation to his death was circumstantial—the facts relied upon to prove suicide as well as the facts relied upon to prove assassination, and we submit that the evidence of the witness Bernhard was admissible under either theory, and that it was error to exclude it from the jury.

III.

Passing, for the present, the other assignments of error in ruling upon the admissibility of testimony, we pass to the charge of the Court, and the assignments of error in said charge.

The first error relied upon in said charge, is that portion of it relating to the presumption against suicide and the burden of proof.

The complaint alleges as follows: (Tr. p. 5.)

"That said Louis B. McWhirter did not die from "any cause in said policy mentioned" (suicide being one named), "but that he did die on the 29th of "August, 1892, at the City of Fresno, County of "Fresno, and State of California by being *murdered and assassinated* by certain persons to the plaintiff "unknown, etc."

The answer denies this allegation and alleges affirmatively that Louis B. McWhirter did commit suicide, and that he did die by his own hand. (Tr. p. 25.)

Hence the only issues raised by the pleadings as to the cause of death was *death* or *suicide*. There was no question of accidental death, and from his entire record there can be no inference drawn of any

accidental death. Louis B. McWhirter was either assassinated by some one unknown or he died by his own hand. In cases of this kind, which party has the burden? Upon whom does it lie to prove by a preponderance of evidence to show the cause of death? Upon the plaintiff who alleges that the death was not by suicide but that it was by assassination, or upon the defendant who denies such allegations and each of them.

The learned Judge in the Court below instructed the jury in his charge:

That the burden of proof was upon the defendant. (The Insurance Company) (Tr. p. 291), and that the presumption was that he did *not kill himself.* (Tr. p. 292.)

That particular portion of the charge referred to appears at the bottom of Tr. page 291 and the top of page 292 and is as follows:

"You are instructed *that the real issue in this case and "the one upon which the burden of proof lies upon "the defendant the Insurance Company, is whether Louis "B. McWhirter killed himself, and that whether any other "particular person killed him. If any other person than "himself killed McWhirter, the plaintiff* IS ENTITLED TO "RECOVER."

The presumption of law is, that "Louis B. "McWhirter, the decedent, *did not kill himself* and the "plaintiff is entitled to the benifit of that presumption, "until the same has been *overcome and rebutted by* "*satisfactory evidence.*" (The italics are ours.)

This portion of the charge was erroneous, we submit. While it is true that there are many cases that hold that when it is a question as to whether the deceased's death was caused by *accident* or he committed suicide, the presumption is against suicide and in favor of accidental death, for the reason that suicide was in the nature of a crime, it was *self murder*, and contrary to the general conduct of mankind. It shows gross moral turpitude, and the law that holds all men innocent until their guilt is proven will not presume that a person committed suicide, but will presume against it. But the same argument applies with equal strength to the allegation that said decedent was assassinated. The law will not presume that one man murdered another, and hence in cases where the question is soley whether the deceased committed suicide or was assassinated there is *no presumption* whatever indulged in, and the burden is upon the plaintiff to prove the allegations of his complaint.

Trader's Ins. Co. *vs.* McConkey, 127 U. S. 661–667.

Where the entire question is disscussed and an instruction similar in character to the one given in this cause, was held error.

To the same effect is:

M. L. Ins. Co. *vs.* Hogan, 80 Ill. 35, 41.
Garrettson *vs.* Pegg, 64 Ill. 111.

It seems to us that the law is particularly and peculiarly applicable to the facts in this case.

For here we have no middle ground; no room for any inference of accidental death. Louis B. McWhirter was either murdered or he committed suicide.

Evidence was offered upon both theories, and can it be said or successfully maintained that there was a greater probability that some person murdered him, than that he murdered himself? We submit that such is not the law, and that as the plaintiff alleged in her complaint, that McWhirter did not commit suicide, but that he was murdered, that under the rule of law that the plaintiff has the affirmative, she should have been compelled to prove it, and that not only was there no presumption of law in her favor, but upon her was the burden; and again the Court in said charge, says:

"The presumption is that Louis B. McWhirter *did "not kill himself.*" Who then did kill him? He was undoubtedly killed. By said instruction the Court in effect told the jury that some other person killed McWhirter, and that the defendant Insurance Co. must show that he did not do so.

IV.

The next error which this plaintiff in error calls to the attention of this Court is the refusal of the Court to charge the jury, as requested by plaintiff in error, in Instruction XII, Tr. page 301. The Instruction was as follows:

"The question and answer referred to in Instruction "XI were a warranty upon the part of Louis B. Mc-"Whirter that there was no fact in his personal history

"that would increase the hazard or increase the "premium of said insurance, and you are instructed "that the only question for you to determine is as to "whether or not said warranty was true. It makes no "difference whether said representation was material "or not if you find from the evidence that the same "was untrue, then it is your duty to find a verdict for "defendant."

The question and answer referred to in Instruction XI were as follows:

"Is there any *fact* relating to your physical con- "dition, *personal* or family history, or habits which has "not been stated in the answers to the foregoing "questions, and with which the Company ought to be "made acquainted?"

The answer to that question was, "*No.*"

The question brought down to fit the exact facts of this case divested of all verbage would be as follows:

"Is there any *fact* relating to your *personal* history "which has not been stated in the answers to the fore- "going questions and with which the Company ought "to be made acquainted?"

Answer, "*No.*" (Tr. p. 300.)

The answer alleged that there had been a breach of warranty upon the part of the assured and the beneficiary by reason of said question having been answered falsely. (Tr. pp. 68–69.)

The applications for insurance which are attached to the answer, and made a part of the same, show the question and answer above referred to (Tr. p. 88), and show also the following question and answer.

"Q. Have you reviewed the written answers to the "above questions, and *are you sure they are correct and "true?*" Answer, "*Yes.*" (Tr. p. 88.)

The warranty signed by both the assured and his wife, the beneficiary herein and defendant in error, appears in full on pages 88–89, of the Transcript. By such warranty it was stipulated that all of said answers were warranted to be true, and it provided further: "that if there be in any of the answers "herein made any *fraud*, untruth, evasion, or con- "cealment of facts then any policy granted upon this "application shall be null and void, etc." (Tr. pp. 88–89.)

This was a warranty that there were no facts in his personal history that the Insurance Company ought to be made acquainted with and we insist that under all of the authorities which treat of the subject that the only question for the jury to determine is, were such answers *true or untrue*. If they were untrue they will avoid the policy. It is for the Court to determine as a question of law whether the questions and answers were a warranty, and it was the province of the jury to determine only their truth. But in the case at bar the Court below submitted the entire question to the jury, that of warranty; that of the truth or falsity, and the additional question as to whether said warranty was *material*, and refused to instruct the jury as requested by plaintiff in error, in Instructions XI and XII; but that portion of the charge which he did give in relation to said warranty was erroneous for the reason that he left the entire question to the

jury. As all of these questions are so closely related to each other, and as the authorities treat of them in the same cases, we will present them together, that is, the failure to give the instructions asked, and the error in the charge as given, and which appears on pages 284–285.

"A warranty must be strictly complied with, it "makes no difference whether it is a material or a "trivial fact."

Bliss on Life Ins., Sec. 36.

In *Ripley* vs. *Aetna Life Ins. Co.*, 30 N. Y. 136–163, the Court says:

"A warranty being in the nature of a condition "precedent and therefore to be performed by the insured "before he can demand performance of the contract on "the part of the insurer, it is quite immaterial for "what purpose or with what view it is made, or "whether the insurer had any view at all in making "it. But being once inserted in the policy, it becomes "a binding condition on the insured, and unless he "can show that it has been *literally fulfilled* he can "derive no benefit from the policy."

We submit that the authorities are uniform both in the United States and in England, that a warranty which is false avoids the policy and that the question of materiality has no bearing in the case of warranty.

Bliss on Life Ins., Sec. 39.

Anderson *vs.* Fitzgerald, 4 H. of Lds. cases 484.

Brady *vs.* United Life Assn., 60 Fed. Rep. 727.

Cobb *vs.* Covenant Mut. Benefit Assn., 25 N. E. (Mass.) 230.

Baumgart *vs.* Modern Woodman (Wis.), 55 N. W. 713.

Fisher *vs.* Crescent Ins. Co., 33 Fed. Rep. 544.

Jeffries *vs.* Life Ins. Co., 22 Wall. 47.

Aetna Life Ins. Co. *vs.* France *et al.*, 91 U. S. 510.

Phoenix Life Ins. Co. *vs.* Radden, 120 U. S. 183.

Clements *vs.* Supreme Assembly R. S. G. F., 131 N. Y. 485.

When a policy of insurance to title to land says that any untrue answer in application, etc., shall avoid the policy, answers amount to a warranty, and there can be no question as to the materiality of the same.

Steusgoard *vs.* St. Paul, 52 N. W. Rep. (Min.) 910

Where truth of representations is warranted in the policy, it is error to instruct the jury as to the materiality of representations.

Noone *vs.* Transatlantic F. I. Co., 88 Cal., 152.

An application for insurance warranted the answers to be full, correct and true. A false answer was found in the application. *Held*, avoided policy.

Wilkins *vs.* Mut. Reserve, etc., 7 N. Y. S., 589.

Where the policy declares that the representations in the application are warranted to be true, and that the policy shall be void if they are untrue, falsity in the representations will defeat the policy.

Gluting *vs.* Met. L. I. Co., (N. J.) 13 Atl. Rep., 4.

Custman *vs.* State I. Co., (Or.) 18 Pac. R. 466.
Phenix I. Co. *vs.* Benton, 87 Ind., 132.

If the insured at the time of making his application, was in apprehension of incendiarism, and represented that he was in no apprehension, he cannot recover.

Whittle *vs.* Farmsville Ins., etc. 3 Hughes (Circuit Ct.) 421.

In an action upon a policy conditioned to be void for misrepresentation, the fact that the assured died from a *fall* and not from the effect of previous disease (about which the previous misrepresentation had been made) does not entitle beneficiary to recover.

Venner *vs.* Sun Life Ins. Co., 17 Carr. S. C. R., 394.

In life insurance, if the application and policy make the contract conditional on the correctness of the answers, an untrue answer will defeat the policy.

Neill *vs.* Am. Pop. L. Ins. Co., 42 N. Y. Supr. Ct. 259.
Ritzler *vs.* World, etc., 42 N. Y. 809.
Barteau *vs.* Phoenix, etc., 67 Barb. (N. Y.) 354.

Concealment of the fact that applicant feared vessel lost. *Held*, made policy void.

Hart *vs.* British Ins. Co., 80. Cal., 440. (This was a clear case of concealment of facts.)

A concealment in respect to a matter inquired for is fatal, though not material.

Farm Ins. Co. *vs.* Thomas, 10 Brad., 545.

Where a party stipulates in his application for a life policy that all his statements therein are material, and that falsity in any of them shall avoid the contract, the Court cannot, without an enabling statute, pronounce any of them immaterial.

Johnson *vs.* Maine R. R., 83 Me. 183.

There seems to have been some confusion in the charge of the Court arising, no doubt, from the fact, that a warranty in an application and policy was considered in the same light as a representation, as the Court evidently instructed as to representations and not as to warranties. But a sharp distinction is made in all the authorities between warranties and representations. The former must be true, whether material or immaterial, while some of the authorities hold that a representation must be of a material fact to void the policy.

Mut. Benefit Life Ins. Co. *vs.* Miller, 39 Ind. 475.

Mut. Benefit Life Ins. Co. *vs.* Robertson, 59 Ill. 123.

Moulon *vs.* American Life Ins. Co., 111 U. S. 335.

Mut. Benefit Life Ins. Co. *vs.* Robinson, 7 C. C. A. 444; same case, 58 Fed. Rep. 723.

Statements in an application for insurance, made a part of the contract and expressly declared to

be warranties, cannot be construed to be representations.

Prov. Savings Life Assn. *vs.* Llewellyn, 7 C. C. A, 579. Same case, 58 Fed. Rep. 940.

Brady *vs.* United Life Assn. (C. C. A.), 60 Fed. Rep. 727.

The fact that the deceased believed the statements in the application to be true is no defense to a breach of warranty. "The warranty of correctness is "absolute," says Bliss on Life Insurance, "It was not "that the statement it believed to be true by the party "who makes it, but that it is true in point of fact."

Tested by the foregoing authorities, we think the instructions given by the Court on this defense were erroneous, and that the Court improperly refused to charge the jury as requested by the defendant. According to the instructions given by the Court, the question is left to the jury to determine as to whether a material fact was concealed by a false answer given to question number eleven, if such false answer was given, and it was also left to the jury to determine whether the deceased knowingly gave a false answer. The portion of the charge which is particularly erroneous in this regard is found on page 284 of the Transcript, and is as follows: "And if you find that "such threats had been made, and that such danger "existed, and he knew it, and that the facts so with-"held from the knowledge of the insurance company "were material facts, then your verdict should be for "the defendant."

That the allegation of the answer in relation to the assured, Louis B. McWhirter, being in fear of being killed, was fully proven. (See Tr. pages 151–162–231–232–233–234–5–268.)

He, the assured, even went so far in his statements to the witness, J. A. Lane, whom he was endeavoring to prepare for a witness, as to state that he had informed the insurance companies *that they were taking an unusal risk.* (Tr. p. 163.)

Notwithstanding that he knew that such was the fact, he in effect and in law warranted to plaintiff in error that it *was not* taking any unusual risk, that there was nothing in his history which they ought to know, when by his own statement he knew said warranty to be untrue.

And again, he expected that his wife would have trouble with the insurance companies, and he wanted Lane to be a witness against them. (Tr. p. 163.)

Why was he in his life-time speaking of such trouble after his death, if he was not going to kill himself and if he had made no false statements in his application.

"The wicked flee when no man pursueth."

All of the evidence in relation to his expecting to be killed stands uncontradicted. There is not even a conflict of evidence upon the question, and this being a warranty, and the unconflicting and uncontradictory evidence showing such warranty to be false, we submit that the judgment of the Court below should be reversed on the ground that it is contrary to the evidence.

V.

But the gravest error in the entire proceeding was, we submit, in the Court finally in its charge taking away from the consideration of the jury, the questions of breach of warranty and fraudulent concealment, and submitting to them only the question of suicide. (Tr. p. 291.)

The Court charged the jury in the following language without any qualification: "If any other "person than himself killed McWhirter *the plaintiff is* "*entitled to recover.*"

And again on page 193 the Court charged the jury:

"You are further instructed that *the entire theory* of "defense in this case is based upon the *assumption* that "Louis B. McWhirter prepared the clubs, etc." And further on, on the same page, the Court said:

"If you should find from the evidence that Louis "B. McWhirter did not make such preparations; "that he did not saw the the Club found upon "his premises; that he did not prepare the mask; that "he did not own or possess both pistols; that he did "not fire all the shots, the bullet holes of which were "found in the fence and out house and on his own "body, *your verdict should be for the plaintiff.*"

If the jury obeyed this instruction they must find for the plaintiff if they believed that McWhirter did not commit suicide, for there was no limitation put upon the language at all. They were told that the *entire theory* of the defense was as stated in that portion of said charge. This was a mistake, for the theory was a breach of warranty, a fraudulent con-

cealment and suicide, and the jury might have found each and every one of the facts stated in said portion of the charge, and yet the defendant been entitled to a verdict upon its other defenses; and so with the other portion of the charge, that if they believe McWhirter did not kill himself then they should find for the plaintiff. Under the evidence and pleadings in this case the jury might have believed that McWhirter did not kill himself and nevertheless defendant have been entitled to a verdict on the other issues.

Then again, we submit, that it was utterly impossible for the jury to obey this portion of the charge and that portion appearing upon Tr. pages 283–284, where the Court charged in relation to concealment, etc., for by that portion of said charge they were told that if said McWhirter concealed certain facts they should find for the defendant, and in the other portion they are informed that the *entire theory* of the defense is of such a character that it excludes all questions *except suicide*.

We submit that there can be no question but that said portion of the charge was erroneous and that it tended to mislead the jury.

VI.

Instruction XI should have been given. It stated the law correctly, as we have shown by the authorities, and was not covered by any other portion of the charge. For Instruction XI was asked upon the ground and to sustain the theory of a breach of

warranty and the charge as given by the Court had reference to a fraudulent concealment (see page 284, and instruction specially upon the question of materiality, that the jury must find such answer was material, etc.,) but the instruction asked was upon an entirely different theory and we submit that it should have been given.

VII.

Instruction XIII, was correct as a statement of the law applicable to the facts of this case, as we have shown by the authorities herein cited, and should have been given.

North American Fire Ins. Co. *vs.* Throp, 22 Mich. 165–166.

Curry *vs.* Commonwealth Ins. Co., 10 Pick 535.

Bebee *vs.* Hartford M. F. Ins Co., 25 Conn. 51

N. Y. Bowery Fire Ins. Co. *vs.* Ins. Co. 17 Wend. 359.

And the evidence which we have herein referred to shows conclusively that the said instruction was justified by the evidence.

For these reasons plaintiff in error submits that the judgment should be reversed and a new trial granted.

Respectfully submitted,

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J. C. CAMPBELL,
Attys. for Plaintiff in Error.